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WILLIAM D. DELAHUNT
District Attorney
NORFOLK DISTRICT

THE OPEN MEETING LAW

How To Follow The Open Meeting Law:

A Handbook from Norfolk County

District Attorney William D. Delahunt

Assistant District Attorneys
Interpreting the Open Meeting Law:

John Corbett
Robert Cosgrove
Stephanie Martin Glennon

Acknowledgments

An earlier version of this manual was written by Norfolk County Assistant District Attorney John Corbett while on the staff of the Plymouth County District Attorney's Office. This version represents a complete revision, with additional contributions by other members of the Norfolk staff.

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Introduction

In 1958 the Massachusetts State Legislature joined a growing number of states in passing an "open meeting law." As the Supreme Judicial Court aptly noted in a Hampden County case, Pearson v. Board of Health of Chicopee, "the law must rely for its enforcement on the already overburdened district attorneys."

We stand ready, of course, to deal with violations of the law. But the greater challenge, it seems to me, is to help educate public officials to prevent violations before they happen.

I firmly believe that the overwhelming majority of public officials earnestly want to follow the law. I also believe in the old adage: better a fence at the top of the hill than an ambulance down below.

This book, in simple English, sets out the law with an eye toward the practical problems of town boards. To flesh out certain points, and to give a flavor of the diversity of issues that arise, we've included copies of selected opinion letters.

I hope you find it useful!

Bill Delahunt

December, 1994

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SECTION I : MEETINGS

All meetings of a governmental body shall be open to the public and any person shall be permitted to attend any meeting except as otherwise provided in this section. G.L. c.39, s. 23B.

The central provision of the open meeting law, quoted above, is a general mandate that meetings of "governmental bodies" be open to public attendance. The definitions, also provided by the statute, contain broad descriptions of the terms "governmental body" and "meetings" consistent with the legislature's intention that all public business, with the exception of very narrowly described and limited circumstances, be conducted in open sessions.

"Governmental body", every board, commission, committee or subcommittee of any district, city, region or town, however elected, appointed or otherwise constituted, and the governing board of a local housing, redevelopment or similar authority; provided, however, that this definition shall not include a town meeting." G.L. c.39, s.23A.

While it is clear that the open meeting law does not apply to individual public officers, such as mayors or chiefs of police, it is equally clear that all collegial groups are subject to its requirements. The law cannot be circumvented by the delegation of public business to subcommittees or boards "however elected, appointed or otherwise constituted."

Subcommittees appointed by any governmental body are covered by the law. Nigro vs. Conservation Commission of Canton, 17 Mass. App. Ct. 433 (1984). It is consistent with this broad definition to interpret it to include not only subcommittees comprised of the parent governmental body members, but also subcommittees, or special purpose committees, that may contain individuals who are not on the parent body. As long as a body, however constituted is carrying out delegated functions or responsibilities of the parent body, its convenings are required to be open to the public.

The fact that the jurisdiction of the subcommittee extends only to making recommendations to the parent governmental body does not render the law inapplicable.

"Meeting," any corporal convening and deliberation of a governmental body for which a quorum is required in order to make a decision at which any public business or public policy matter over which the governmental body has supervision, control, jurisdiction or advisory power is discussed or considered; but shall not include any on-site inspection of any project or program.

"Deliberation," a verbal exchange between a quorum of members of a governmental body attempting to arrive at a decision on any public business within its jurisdiction.

This section shall not apply to any chance meeting or a social meeting at which matters relating to public business are discussed so long as no final agreement is reached. No chance meeting or social meeting shall be used in circumvention of the spirit or requirements of this section to discuss or act upon a matter over which the governmental body has supervision, control, jurisdiction or advisory power.

Once again, the intention of the legislature to require open meetings under all but very narrow circumstances is made clear by the broad definition of "meetings" and "deliberations."

It has been argued that a meeting between members of a town board and its attorney did not constitute a meeting and deliberation of the board, as it did not consist primarily of communication between the board members themselves. The Supreme Judicial Court rejected this narrow approach to the definition of "meeting" and deliberation and, holding that the consultation was an exchange of views among members of the board and between the board and its attorney, indicated that the convening did fall within the statute. District Attorney for the Plymouth District v. Board of Selectmen of Middleborough, 395 Mass. 629 (1985).

From this it can be seen that the Courts will not be receptive to hypertechnical arguments that a particular gathering of a board does not fall within the statute because a particular conversation did not amount to deliberations, or that a particular verbal exchange was not in the course of attempting to arrive at a decision.

It has been suggested that a board may meet to discuss public business in private so long as there is no specific intention to vote on, or make a final decision on, an issue. This interpretation is flatly contradicted by the Supreme Judicial Court's holding in the Middleborough case that a simple "exchange of views" by members of a board on a public issue was sufficient to constitute a meeting. 395 Mass. at 634, n.6.

In summary, a verbal exchange on a public issue within the jurisdiction of a public board which takes place between a simple majority of the members of that board will, in almost all circumstances, be governed by the formalities prescribed in the open meeting law. Moreover, the absence of a majority of the board members does not mean that discussions of public business may be discussed free of the constraints of the open meeting law. Private "serial" conversations by board members preparatory to public discussion and vote have consistently been held by the Norfolk County District Attorney to violate the law, a position consistent with that adopted by other district attorneys and enforced in court. See Attorney General v. Board of Selectmen of Lexington, No. 88-3644 (Middlesex Superior Ct. August 18, 1989).

Chance meetings or social meetings during which board members discuss "matters relating to" official business are exempted from the statute. However, such meetings cannot be used to circumvent the letter and spirit of the law. Thus it can be seen that a board which

uses its formal meetings merely to ratify decisions made in private is in violation of the open meeting law. All private discussions of public business by board members run the risk of violating the law.

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September 18, 1990

Robert E. Tierney, Chairman
Braintree Planning Board
One John Fitzgerald Kennedy Memorial Drive
Braintree, Massachusetts 02184

Dear Mr. Tierney:

This letter constitutes our office's response to the Open Meeting Law complaints received in connection with settlement of the lawsuit concerning the Braintree Hospital special permit parking issue.

As you know, the thrust of the complaints is that Planning Board members, in violation of the Open Meeting Law, convened and agreed to the settlement. A crucial question is whether the time constraints involved in assessing the proposed settlement may have rendered it impossible for the Planning Board to have held a posted meeting concerning the settlement. Because the final, revised settlement was not drafted until May 21, 1990, the same date the matter was scheduled for trial, it appears that there was not sufficient time in which to hold a posted meeting with regard to its approval. For that reason, we do not think it appropriate to seek to set aside the final agreement on the basis of the Open Meeting Law.

A more troublesome problem arises with regard to the proposed settlement that was drafted the week prior to May 21 and made available that weekend in the Planning Board Office. Apparently, terms of the proposed settlement were discussed serially with Planning Board members, and such discussions took place as early as the date of Town Meeting held almost a week prior to May 21. In the circumstances which participants have described to this office, it appears that such a time frame would have permitted the Planning Board to hold a posted meeting with regard to the proposed settlement.

This office recognizes that the Planning Board could legitimately have invoked the litigation exception to the Open Meeting Law, G.L. c. 39 sec. 23B, and could after posting the meeting have convened in executive session to discuss the proposed settlement. See Powers v. Freetown-LakeVille Regional School District Committee, 392 Mass. 656, 659 (1984).

In fact, it appears that there was no executive session with regard to the proposed terms of settlement. There were, however, three executive sessions which involved at least general discussion of the Braintree Hospital litigation. With respect to the proposed settlement, in contrast, town counsel had individual serial meetings with Planning Board members. One of the problems with such consecutive meetings, however, is that there is no way for the public eventually to examine the contents of those meetings to determine what discussions took place. The minutes of an executive session, of course, eventually must be released to the public.

This office is of the opinion that such individual serial meetings violated the Open Meeting Law. Despite the absence of a quorum of Board members at any given such conference, a quorum of members was involved in the discussions, and such private serial discussions constituted "deliberations" because by the use of such conferences the Board was able to gather information to aid it in arriving at a decision about settling litigation to which the Board was a party. See Gerstein v. Superintendent Search Screening Committee, 405 Mass. 465, 470 (1989). Thus, to the extent that the Board had more than forty-eight hours in advance of the trial date in which to assess the terms of a proposed settlement, it should have done so by means of a posted meeting. Because the Board then could legitimately have met in executive session concerning this issue, it is the opinion of this office that the appropriate remedy for the Open Meeting Law violation would be for the Board now to create a record of the discussions that were held in the serial meetings. Such a record should at very least contain an account of which Board members approved the proposed settlement and which members did not.

Now that the settlement has been reached, there appears to be no justification for keeping secret the minutes from the executive sessions which included discussion of earlier phases and aspects of the litigation. See Foudy v. Amherst-Pelham Regional School Committee, 402 Mass. 179, 184 (1988). It is therefore the opinion of this office that the Planning Board should also at this time release minutes of the four executive sessions that made reference to the Braintree Hospital litigation: the minutes of meetings held March 28, 1989; November 14, 1989; February 27, 1990; and April 10, 1990. We are hopeful that doing so will help to ease the concerns members of the public have raised about the settlement process.

Very truly yours,

Stephanie M. Glennon
Assistant District Attorney

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November 6, 1992

Ms. Patricia R. Cooke

RE: Interpretation of Open Meeting Law

Dear Ms. Cooke:

I apologize for the inordinate delay in responding to your inquiry regarding the Open Meeting Law. Apparently your letter was inadvertently mislaid when first received, and it was not until you recently fowarded another copy that it came to my attention.

I will address your questions in the order in which you present them. You first inquire whether a committee may discuss and vote on an item in open session to which it refers solely by a designated report number. It is the opinion of this office that it may not. To rule otherwise would essentially allow a governmental entity to conduct a meeting in code, thereby thwarting the intent of the Open Meeting Law. See Attorney General v. School Committee of Northampton, 375 Mass. 127 (1978) (school committee violated Open Meeting Law by discussing candidates for superintendent by number rather than name, thereby shielding their identities).

You next ask under what circumstances a committee may conduct binding telephone votes. I am not entirely clear about the thrust of your question. If, however, you are inquiring whether committee members may engage in a series of one-on-one telephone conversations in which they deliberate and vote upon committee business, the answer is no. The Open Meeting Law prohibits governmental bodies from meeting in private when deliberating on any matter of public policy. See G.L. c. 30A, s. 11A. Obviously, it would be anomalous for the law to establish such a prohibition while allowing a board to readily circumvent it by permitting the members to engage in deliberations over the telephone. To do so would permit a board to avoid the public scrutiny that the Open Meeting Law was intended to foster.

I hope that I have answered your inquiries with sufficient specificity. Should you have further questions in light of my responses, please feel free to contact me.

Very truly yours,

James Lang
Assistant District Attorney

JFL

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May 10, 1993

Mr. Eugene W. Creedon
Superintendent of Schools
70 Coddington Street
Quincy, MA 02169

RE: Open Meeting Law Inquiry of the Quincy School Committee

Dear Mr. Creedon:

My purpose in writing this letter is to render the opinion of this office, requested by the Quincy School Committee, as to whether or not the Committee's meeting of March 8, 1993 with the New England Association of Schools and Colleges (NEASC) violated the Open Meeting Law, G.L. c. 39, ss. 23A et seq.

As I understand the facts, a subcommittee of NEASC requested various meetings, one of which was with the Quincy School Committee, in preparation for a show cause hearing concerning the accreditation of Quincy College. The meeting, set for March 8, 1993, was duly posted as a Quincy School Committee meeting. On the appointed date, three (of seven) school committee members were present, along with yourself, the NEASC subcommittee, and other parties. As the School Committee was about to call the meeting to order, Dr. Beales of NEASC objected that the meeting was in fact a NEASC meeting, not a school committee meeting, and after some discussion, counsel for the School Committee agreed, and left the meeting along with yourself. The meeting then continued with the press excluded. No votes were taken by the School Committee members in attendance.

There is no doubt that the School Committee is a body subject to the Open Meeting Law; indeed, the Committee, until challenged by Dr. Beales, proceeded under the assumption that its meeting with NEASC was subject to the law's strictures.

The matter under discussion pertained to the official duties of the School Committee, and was thus a legitimate area of public scrutiny. As this office has often observed, the purpose of the Open Meeting Law is to "eliminate much of the secrecy surrounding the deliberations and decisions on which public policy is based." Ghiglione v. School Committee of Southbridge, 376 Mass. 70, 72 (1978). To accomplish this end the Law prohibits governmental bodies from meeting in private when deliberating on any matter of public policy before them. G.L. c. 39, s. 23B.

In this instance, however, NEASC's purposes were apparently in conflict with the law; a private meeting freed NEASC from public and press attendance, and the presence of counsel for the School Committee. It may be inferred that NEASC felt that the presence of such parties would inhibit the candor necessary for their fact-finding mission. The correctness of such a presumption is irrelevant to a determination of whether the Open Meeting Law has been violated, since the weighing of competing interests is a consideration for the legislature. See District Attorney for the Plymouth District v. Board of Selectmen of Middleborough, 395 Mass. 629, 633 (1985); Attorney General v. School Committee of Northampton, 375 Mass. 127, 130 & n.3 (1978).

That the meeting was called by NEASC, rather than the School Committee, is also irrelevant. A board subject to the Open Meeting Law may not meet as the "guests" of another party and claim an exemption thereby; such an exception would threaten to swallow the general rule. See Letter Ruling of Norfolk District Attorney in re: Weymouth D.P.W. (January 26, 1993) (attendance of quorum of commissioners at closed "staff meeting" to interview bidders on D.P.W. contract for purpose of preparing staff report to commissioners violated the Open Meeting Law); Letter Ruling of Norfolk District Attorney in re: Norwood Selectmen (February 26, 1993) (closed meeting with Norwood Hospital officials to discuss hospital security procedures relating to its psychiatric patients violated the Open Meeting Law). I note that the Attorney General has reached an analogous conclusion, observing that "When quorums of two governmental bodies meet jointly it is a meeting of each governmental body. If only one of the governmental bodies has a quorum present, it is a meeting only of that governmental body." Harshbarger, Open Meeting Law Guidelines, p. 8 (emphasis supplied).

The Attorney General's observation also has the effect of suggesting the possibility that because no quorum was present, discussion at the NEASC meeting did not violate the Open

Meeting Law. See G. L. c. 39, s. 23B ("no quorum of a governmental body shall meet in private" (emphasis supplied)). That possibility is illusory. The same section provides that "no chance meeting or social meeting shall be used in circumvention of the spirit or requirements of this section to discuss or act upon a matter over which the governmental body has supervision, control, jurisdiction or advisory power." Id. The accidental failure of the Committee to achieve a quorum converted the convening of those members present to a "chance meeting" or something closely analogous. To put the question differently, if a regular School Committee meeting lacked a quorum, could the members present retire to a back room and discuss official business? I think not. See Letter Ruling of Norfolk District Attorney in re: Braintree Planning Board (September 18, 1990) (discussions at individual serial meetings violated the Open Meeting Law notwithstanding absence of a quorum at any given conference).

This office has adopted the view that "the congregation of public officials in almost any capacity is readily conceded to be a meeting." Note, The Massachusetts Open Meeting Law, An Historical Overview and Contemporary Analysis, 25 New Eng. L. Rev. 257, 262 (1990). The Committee's meeting with NEASC fell into no recognized exception to the Open Meeting Law, nor was any exception invoked. It follows, therefore, that the Quincy School Committee violated the Open Meeting Law, albeit in good faith and inadvertently.

As no action was voted at the meeting, rescission is not a consideration. However, the Committee should prepare and approve minutes summarizing the discussion and make them available to the press and public.

Thank you for your anticipated cooperation; please feel free to call me should there be any question or difficulty concerning the above ruling.

Very truly yours,

Robert C. Cosgrove
Assistant District Attorney

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May 25, 1993

Carolyn Brewer

Dear Ms. Brewer:

In response to your written complaint concerning the activities of the AIDS Advisory Committee, this office has reviewed the applicable statutes and case law, as well as documentation concerning that Committee's construction and functions.

It is the opinion of this office that the AIDS Advisory Committee does not constitute a "governmental body" subject to the provisions of the Open Meeting Law, but, rather, that it constitutes an advisory committee appointed by the Superintendent to assist him in carrying out statutory duties not subject to the Open Meeting Law, and as such is not itself subject to the Open Meeting Law's provisions. See Connelly v. School Committee of Hanover, 409 Mass. 232, 233-238 (1991).

In a similar instance, this state's Supreme Judicial Court held that a selection committee appointed by a Superintendent of Schools in order to assist him in nominating and recommending to the school committee a candidate for high school principal was not subject to the requirements of the Open Meeting Law. Connelly, supra, at 233-238. The Court noted that the

Superintendent "clearly" was not a "governmental body," that the committee "was not created pursuant to any statute or by-law, but was appointed informally by the superintendent," and that the pertinent committee was not a committee of the town or any subdivision thereof, but rather was a "committee of the superintendent." Id.

In the circumstances present here, just as in Connelly, the committee "is really just an extension of the superintendent, performing a function that the superintendent himself could perform free from open meeting law scrutiny." Id. at 236 n. 8.

Although "governmental bodies" subject to the provisions of the Open Meeting Law include "subcommittee[s] of any board, commission or committee of any city or town," G.L. c. 39 sec. 23A; Nigro v. Conservation Commission of Canton, 17 Mass. App. Ct. 433, 434 (1984), the information we have reviewed satisfies us that the AIDS Advisory Committee was not formed by the town of Braintree or its School Committee, but was formed by the Superintendent, consistent with statutory powers entrusted to him pursuant to G.L. c. 71 sec. 59 (1988 ed.)(endowing Superintendent of schools with powers and responsibilities including that of "recommend[ing] to the [school] committee teachers, textbooks, and courses of study.").

Accordingly, we appreciate your attention to this matter and your inquiry, but we conclude that there has not been any violation of the Open Meeting Law.

Very truly yours,

Stephanie M. Glennon
Assistant District Attorney

SECTION II : NOTICE

Except in an emergency, a notice of every meeting of any governmental body shall be filed with the clerk of the city or town in which the body acts, and the notice or a copy thereof shall, at least forty-eight hours, including Saturdays but not Sundays and legal holidays, prior to such meeting, be publicly posted in the office of such clerk or on the principal official bulletin board of such city or town

"Emergency," a sudden, generally unexpected occurrence or set of circumstances demanding immediate action."

The intention of the notice provisions of the open meeting law is obvious. The public's right to attend the meetings of a governmental body would be rendered hollow unless citizens are provided with a means to inform themselves of the time, date and place of the meeting. Thus, the posting requirements are not an empty formality but rather the core of the statute. The postings must give the public actual notice of the time, date and place of a meeting. There is no requirement that the agenda or subject be contained in the notice. The Open Meeting Law imposes no notice requirements for the cancellation of meetings.

A governmental body may comply with the notice requirements by filing and posting in advance a printed schedule of future meetings. If such a schedule of future meetings is compiled and posted, there is no need to file and post a separate notice of each meeting prior to holding that meeting. In such case, the body should in fact meet regularly at the scheduled time and place and, if there is an adjournment or cancellation, it should be posted; conceivably, a pattern of unannounced cancellations may render the notice ineffective.

It has been suggested, erroneously, that a board may satisfy the notice requirements by posting a notice that indicates a range of times within which the board may meet. One municipality, in another county, posted notices which indicated that its boards would hold meetings during the hours of 9:00 a.m. to 5:00 p.m., Monday through Friday. Such a posting is meaningless when it is understood that the statute's requirement is intended to give the public actual notice of the exact date, time and place of the meeting so that those citizens who wished to attend may do so. The illegality of the posting described above is therefore obvious. No posting is adequate if it leaves the public in doubt as to the circumstances under which a meeting is held.

The notice requirements need not be complied with when a meeting is occasioned by an emergency which is defined as "a sudden, generally unexpected occurrence or set of circumstances demanding immediate action." Nevertheless, notice requirements should be complied with to the extent possible; the fact that an emergency may require meeting on 24-hour notice is not a reasonable basis for giving no notice.

The principal case touching on what constitutes an "emergency" meeting under the open meeting law is Pearson v. Board of Health of Chicopee, 402 Mass. 797 (1988). There, the board of health did not give notice of a meeting with restaurant owners about reopening their business after it had been closed for twelve days due to salmonella poisoning. The trial court, with the apparent approval of the Supreme Judicial Court, considered the claim of a "health emergency" to be "an open and flagrant" violation of the open meeting law.

Similarly, in a terse opinion, the Appeals Court affirmed a judge's determination that an "emergency" meeting to remove a clerk of the board of assessors who had walked off the job, and a subsequent "emergency" meeting to reinstate him were improperly called, as no "emergency situation" existed. Pentecost v. Town of Spencer, 29 Mass. App. Ct. 991, 992 (1993). One may conclude that claims of "emergency" will be carefully scrutinized to ensure that they do not lead to an improper denial of the public's right to attend meetings. The Supreme Judicial Court has applied such scrutiny to claims of "emergency" under other statutes. See Pioneer Liquor Mart v. Alcoholic Beverages Control Commission, 350 Mass. 1 (1965).

The subject matter to be discussed at an emergency meeting is limited to that necessitated by the emergency. No other business may be discussed. For example, a meeting by a board of selectmen to nominate a police officer to take charge of the police department because of the sudden and generally unexpected resignation of the chief of the department, cannot be used as an occasion to discuss the granting of a liquor license.

Although the issue has yet to be decided, it may well be that a board may not enter executive session at an emergency meeting, since, as discussed later, the first prerequisite for executive session is that the government body convenes "in an open session for which notice has been given."

March 14, 1991

Mr. Charles Fuller

Dear Mr. Fuller:

I am writing in response to your request for a written opinion regarding the posting requirements for board meetings at which subcommittees and the like are invited to attend.

With respect to your specific question, my response is predicated upon recognition that the Open Meeting Law's posting requirements are fully applicable to meetings by subcommittees of muncipal governmental entites. See Nigro v. Conservation Commision of Canton, 17 Mass. App. Ct. 433 (1984). Further, I assume that in the hypothetical scenario you posit, the members of a subcommittee are invited to appear at a meeting of another local board for the purpose of either detailing some official activities in which they have engaged or providing the benefit of their specialized expertise to the board relative to some matter of interest to the community at large. Under such circumstances I think it appropriate that the subcommittee post public notice in accordance with the Open Meeting Law that at a specified time and place its members will be appearing at a meeting of a specified board or commission. This will allow members of the public who have a specific interest in the subcommittee's activities, but who do not customarily follow the activities of the board at whose meeting the subcommittee is to appear, to be apprised of the meeting in question. The only real hardship that such a requirement would impose is to

force any board that intends to invite a subcommittee to appear before it to make that decision sufficiently in advance so as to permit the subcommittee to post notice of its appearance at least forty-eight hours before the board meeting.

If you have any questions about the foregoing, please do not hesitate to call.

Very truly yours,

James Lang
Assistant District Attorney

JFL

October 31, 1991

Town of Dover Board of Health
P.O. Box 250
Dover, MA 02030

RE: Open Meeting Law Complaint of Paul Campanis

Dear Board Members:

It is my purpose in this letter to render a response to the complaint the District Attorney received from a local resident, Dr. Paul Campanis, alleging that the Board of Health (Board) violated the Open Meeting Law, G.L. c. 39, ss. 23A-23C, by failing to post the requisite advance notice of its meeting of August 12, 1991. In a supplemental complaint, Dr. Campanis also charged that the Board cancelled without any advance notice its regularly scheduled meeting of August 26, 1991. I am in grateful receipt of Chairman Bliss' written rejoinder, submitted on behalf of the Board, to both allegations. I will address each contention separately.

With respect to the meeting of August 12th, Chairman Bliss has conceded that the Board did in fact violate the Open Meeting Law in the manner alleged. He ascribes the violation to an administrative oversight that resulted because the Board was functioning without an administrative assistant over the summer and he disclaims any intention on the part of the Board to flout the Open Meeting Law. I accept that representation. I must emphasize, however, that the posting requirements of the law are fundamental to its efficacy. Moreover, they are readily understandable and require little effort by way of implementation. Thus, while I do not doubt the Board's good faith in this instance, further oversights of a like nature will necessarily be viewed in a more critical light.

As to the remedy for the violation, I note that I have not been provided by either the Board or Dr. Campanis with a copy of the minutes of the August 12th meeting. From what I can gather, however, I am of the impression that no substantive decisions were made by the Board on that occasion. Accordingly, there is apparently no need to ask the Board to

nullify any actions taken. The admonition to scrupuously abide by the law's posting requirements in the future will thus suffice.

With respect to Dr. Campanis' second assertion, there appears to be a disagreement about the underlying factual allegation. Dr. Campanis avers that the Board cancelled without prior notice a regularly scheduled meeting that was to be held on August 26th. Chairman Bliss maintains, however, that there was no meeting scheduled for that date because the Board meets only once a month during the summer. It is not necessary for me to resolve the factual discrepancy, but merely to point out that the Open Meeting Law does not impose any specific notice requirements upon governmental entities relative to the cancellation of previously posted or scheduled meetings. Therefore, even if Dr. Campanis were correct, no violation of the law has occurred.[1] Naturally, however, common courtesy would dictate that, except when unexpected exigencies render it impossible to do so, local boards provide some notice to the citizenry when scheduled meetings are to be postponed or cancelled.

If you have any questions about my resolution of this matter, please do not hesitate to contact me.

Very truly yours,

James Lang
Assistant District Attorney

JFL
cc: Dr. Paul Campanis

[1]Inasmuch as Dr. Campanis offers no support for his assertion that the Board did not meet on August 26th "to provide themselves time to arrange, alter or change their records of August 12th," and Chairman Bliss pointedly denies that assertion, I have accorded it no creedence.

SECTION III : MINUTES

A governmental body shall maintain accurate records of its meetings, setting forth the date, time, place, members present or absent and action taken at each meeting, including executive sessions. The records of each meeting shall become a public record and be available to the public; provided, however, that the records of any executive session may remain secret as long as publication may defeat the lawful purposes of the executive sessions, but no longer. All votes taken in executive sessions shall be recorded roll call votes and shall become a part of the record of said executive sessions. No votes taken in open session shall be by secret ballot.

Section 5A of Chapter 66 of the General Laws, further defines the records that must be maintained. That statute states that the records required to be maintained by the open meeting law "shall report the names of all members of such boards and commissions present, the subjects acted upon, and shall record exactly the votes and other official actions taken by such boards and commissions. . . . ."

No verbatim transcript of proceedings is required. Perryman v. School Committee of Boston, 17 Mass. App. Ct. 346, 353 (1983)

A reading of the open meeting law in conjunction with G.L. c.66, s.5A, makes clear that the term "actions taken," as used in the open meeting law, includes the requirement that a record be compiled of discussions, even if no vote is taken or final resolution is arrived at, with respect to the issue discussed.

The public's right of access to the activities of public bodies requires that the subject matter of all discussions, exchange of ideas or deliberations should be identified in the minutes of a meeting of such public body.

Two distinct requirements are made as to the manner of vote. No vote taken in open session may be by secret ballot. Obviously, a secret ballot would defeat the purposes of requiring an open session and diminish public accountability. In executive session, all votes must be recorded roll call votes. In this way, at such time as the minutes of the executive session are made public, it is possible to ascertain an official's position and to hold him accountable.

Minutes compiled in compliance with these statutes are public records. The person having custody of the minutes must permit them to be inspected and examined by any person, under the supervision of the custodian. Copies of minutes must be provided to persons requesting them upon the payment of a reasonable fee. Minutes of a meeting may not be withheld from the public simply because the governmental body has yet to approve them.

The minutes of an executive session are also public records with the exception that they may be withheld from public inspection so long as the need for secrecy which justified the executive session in the first place still prevails, but no longer. A board should make arrangements for the regular review and release of minutes that no longer meet the secrecy requirements.

The burden of showing a need for nondisclosure is upon the governmental body. The Supreme Judicial Court has held that where a school committee met in executive session to discuss dismissal of an employee and resulting litigation, and where the employee later resigned and litigation was terminated, the purpose of the executive session "evaporated" and the minutes had to be disclosed. Fondy v. Amherst Pelham Regional School Committee, 402 Mass. 179, 184 (1988).

Section 10 of Chapter 66, describes the method available to the public to enforce their right to inspect public documents. The Supervisor of Public Documents, under G.L. c.66, s.1, has the power to adopt regulations to enforce the provisions of the statute concerning the content of and access to public records.

A meeting of a governmental body may be recorded by any person in attendance by means of a tape recorder or any other means of sonic reproduction or by means of videotape equipment fixed in one or more designated locations determined by the governmental body except when a meeting is held in executive session; provided, that in such recording there is no active interference with the conduct of the meeting.

In 1975 the legislature expressly provided for audio recording of meetings, and in 1987 extended the law to allow videotaping as well. However, any audio or videotaping must not actively interfere with the meeting.

SECTION IV : EXECUTIVE SESSION

No executive session shall be held until the governmental body has first convened in an open session for which notice has been given, a majority of the members have voted to go into executive session, and the vote of each member is recorded on a roll call vote and entered into the minutes, the presiding officer has cited the purpose for an executive session, and the presiding officer has stated before the executive session if the governmental body will reconvene after the executive session.

The procedures set forth by the statute to be followed when an executive session is convened, are intended, as is the law as a whole, to protect the public's right to know what public bodies are doing. It is a violation of the law for a governmental body to fail to follow the five steps required by statute to enter into executive session. Ghiglione v. School Committee of Southbridge, 376 Mass. 70, 73 (1978).

After a governmental body has convened in an open session, for which valid notice has been posted, a majority of the quorum present must vote, by roll call vote, to approve an executive session. A "majority' has been interpreted to mean a majority of the members present, rather than a majority of the members voting. Thus on a five member board with two members abstaining from a vote, two members voting in the affirmative to enter an executive session, and one member voting in the negative, the motion would fail and an executive session would be in violation of the statute. District Attorney for the Northwestern District v. Board of Selectmen of Sunderland, 11 Mass. App. Ct. 663, 665 (1981).

The reason for the executive session must be stated in open session before the closed proceeding may be convened. This is to insure that the executive session is held only for one of the specific reasons enumerated by the statute. In addition, a statement of the reason for the executive session permits later review of a governmental body's action. The reason stated strictly limits the matters to be considered.

On some occasions, courts have compared the reason stated for an executive session, with the minutes of the closed session and with testimony as to what transpired at the executive session, and have reached the conclusion that the reason stated for the closed session was a sham, Puglisi v. School Committee of Whitman, 11 Mass. App. 142, 144 (1981), and that the executive session was held in violation of the statute.

Recently, the Beverly School Committee voted to enter executive session "for the purpose of discussion [sic] strategies related to collective bargaining," then in executive session voted to enter into a contract with an assistant superintendent, a non-union employee. Notwithstanding that the committee could have validly cited its purpose to negotiate with a non-union employee, a justice of the superior court, noting the committee's failure to do so, invalidated the contract. Witwicki v. Beverly School Committee, Essex No. 92-3038 (1993).

The presiding officer must state whether the governmental body will reconvene in open session after the executive session has been concluded. This is to permit members of the public who are in attendance to make an informed decision whether or not to remain for the purpose of attending a reconvened public session.

An executive session may be held only for one of the eight purposes enumerated in the statute. Yaro v. Board of Appeals of Newburyport, 10 Mass. App. 587 (1980). Exceptions beyond the eight enumerated by the statute are not to be implied. Where there is an express exception to a statute, it comprises the only limitation on the operation of the statute and no other exceptions will be implied. District Attorney for the Plymouth District v. Board of Selectmen of Middleborough, 395 Mass. 629 (1985). In this regard, the statute has been called unambiguous. The burden to show the need for a closed session rests on the governmental body. District Attorney for the Northwestern District v. Board of Selectmen of Sunderland, 11 Mass. App. 663, 666 (1981).

The Commonwealth of Massachusetts

OFFICE OF THE DISTRICT ATTORNEY
FOR THE NORFOLK DISTRICT

WILLIAM D. DELAHUNT
DISTRICT ATTORNEY

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FAX # (617) 326-7937

May 12, 1993

Albert S. Robinson, Esq.
Town Counsel, Town of Wellesley
40 Grove Street
Wellesley, MA 02181

RE: Request for Advisory Opinion Relative to Human Relations Commission

Dear Mr. Robinson:

Your letter of April 23, 1993 asks to what extent, if at all, discussions concerning citizen complaints to the Wellesley Human Relations Committee may be protected against public scrutiny. The broad sweep of the Open Meeting Law covers "every board, commission, committee or subcommittee of any district, city, region or town, however elected, appointed, or otherwise constituted." G.L. c. 39, s. 23A. The Human Relations Committee falls, therefore, within the scope of the Open Meeting Law.

Meetings of the Committee must be open unless falling within an exception to the law. Creation of exceptions is the preogative of the legislature, and courts will not infer additional exceptions. See, e.g., Attorney General v. School Comm. of Northampton, 375 Mass. 127, 130 (1978); Wright v. City of Lawrence, 21 Mass. App. Ct. 343, 346 (1985). Only two of the eight statutory exceptions commend themselves to me as possibilities for maintaining the confidentiality of the Committee's deliberations. In employing any statutory exception, of course, the Committee would have to enter executive session pursuant to the third paragraph of s. 23B.

Under the first enumerated statutory exception, the Committee may enter executive session if their discussion concerns the "reputation, character, physical condition or

mental health . . . of an individual." Presumably, an allegation that someone violated another's human rights would implicate the accused's reputation and character. It bears noting, however, that if this section is to be invoked that the individual in question is entitled to forty-eight hours advance written notice, and that he has the right to be present, to have counsel present, to speak in his own behalf, and perhaps most significantly for purposes of your current inquiry, he may demand that the meeting be conducted in the open.

The second enumerated statutory exception allows executive sessions "to hear complaints or charges brought against, a public officer, employee, staff member, or individual." Although this section appears largely directed at disciplinary proceedings for public employees, the term "individual" is quite broad, and in the past this office has construed it to include, for example, high school students subject to school committee hearings. The case of one accused of a civil violation of another's rights might well be considered under this second exception. The accused under this section has the same rights as under the first exception.

The fifth enumerated statutory exception allows for executive sessions "to investigate charges of criminal misconduct or to discuss the filing of criminal complaints." There is little caselaw setting forth the precise boundries of this exception, but at a minimum, it would seem to require that the Committee be investigating conduct that is arguably criminal, and that the Committee be empowered to recommend the filing of criminal charges. As your Committee, at least as briefly sketched, appears to address civil violations of the law or offensive behavior that falls short of criminal conduct, I doubt that it will truly fall under this exception. The remaining exceptions seem inapplicable on their face.

I might further mention that the procedure your Committee appears to contemplate involves a preliminary "conference" at which it decides to accept or not accept the "case." Such a conference is itself subject to the Open Meeting Law, and any exception thereto must be properly invoked pursuant to statute.

It also bears noting that written complaints, and indeed "all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials, or data, regardless of physical form or characteristics" received by the Committee or its agents are subject to the Public Records Law, G.L. c. 4, s. 7. Copies of such records must be provided a requesting party "as soon as practicable," 950 C.M.R. 332.05(2), but in no case later than

ten days after the making of the request, G.L. c. 66, s.10 (b), unless the Committee can prove "with specificity" that a statutory exemption applies. An appeal by a citizen aggrieved by a denial of records is, in the first instance, to the Supervisor of Public Records. A party may have rights under the Public Records Law that extend beyond his rights under the Open Meeting Law, and the Committee would therefore do well to consider both statutes.

I hope that you and the Committee find my response helpful. If I can be of further assistance, please let me know.

Very truly yours,

William D. Delahunt

William D. Delahunt
District Attorney

WDD:rc

SECTION V : EXCEPTION 1

To discuss the reputation, character, physical condition or mental health, rather than the professional competence of an individual, provided that the individual involved in such executive session has been notified in writing by the governmental body, at least forty-eight hours prior to the proposed executive session. Notification may be waived upon agreement of the parties. A governmental body shall hold an open meeting if the individual involved requests that the meeting be open.

The purpose of this provision is to strike a balance between an individual's right to privacy and the public's right of access to the governmental process. This is consistent with other statutes which recognize that "a person shall have a right against unreasonable, substantial or serious interference with his privacy," G.L. c.214, s.18, and which protect against disclosure of information "which may constitute an unwarranted invasion of personal privacy." G.L. c.4, s.7 clause 26(c).

The exception is also designed to enable a public body to engage in candid discussion about the character and reputation of an individual who is the subject of potential action by that public body. An individual is protected within this exception by the right to be present during discussions or considerations which involve him, the right to have counsel, and the right to speak in his own behalf. G.L. c.39, s.23B(1)(a),(b),(c).

It is clear that the exclusion of discussions concerning "professional competence" from this exception is a recognition of an overriding public right to be informed of the qualifications of individuals who are being considered for, or who are actively engaged in public service. The public's right to know is superior, in this instance, to an individual's preference that his professional competence not be the subject of public discussion.

The exclusion of "professional competence" discussions from this exception has led to litigation in the area of discussions concerning applicants for public employment. The courts have recognized that the Open Meeting law shall be in force "only so far as [it is] not inconsistent with the provisions of any general or special law," G.L. c.39, s.24. It has been argued that the provisions of statutes recognizing rights against unreasonable, substantial or serious interference with privacy can be used to justify private discussion of a job candidate's qualifications.

While no court has recognized an exception for job applicant discussions based upon statutory rights to individual privacy, the Supreme Judicial Court has indicated that it would not recognize such an exception unless it could be shown on the facts of an individual case that "disclosure. . . would have . . . an unreasonable, substantial or serious interference with [a candidate's] . . . privacy." Attorney General v. School Committee of Northampton, 375 Mass. 127 (1978). In the same case, the court rejected the school committee's argument that forced disclosure in such circumstances could discourage potential applicants. The court acknowledged that the school committee raised a policy consideration which could be

addressed by the legislature, but indicated that it would only consider claims where it was shown that disclosure would impinge on a candidate's statutory right of privacy. Subsequently, the legislature did address such concerns, enacting an additional exception to the open meeting law. (See exception 8, below.)

SECTION VI : EXCEPTION 2

To consider the discipline or dismissal of, or to hear complaints or charges brought against, a public officer, employee, staff member, or individual, provided that the individual involved in such executive session pursuant to this clause has been notified in writing by the governmental body at least forty-eight hours prior to the proposed executive session. A governmental body shall hold an open meeting if the individual involved requests that the meeting be open.

Like the first exception, this provision is designed to balance privacy rights of individuals and the public's right of access.

The ultimate say on whether the meeting is to be in executive session or an open hearing lies with the individual whose discipline or dismissal is to be discussed. If the individual requests that the meeting be public, the governmental body proposing an executive session must comply with that request.

As with exception 1, the statute mandates that if an executive session is held, the subject has a right to be present during "discussions or considerations" which involve him, to speak in his own behalf, and to have counsel of his choice present to advise him (but not to actively participate). G.L. c.39, s.23B(2)(a),(b),(c). An individual's exercise of his rights under the open meeting law is "in addition to the rights an individual may have from any other source," and may not be considered a waiver of any other rights. While the language of the statute seems primarily directed at protecting public employees, this office has ruled that it also covers disciplinary hearings of students by school committees.

Until recently, a variation from this general rule was found in G.L. c.71, s.42. That section formerly permitted the dismissal of teachers and superintendents by school committees, and provided that hearings under the statute, "may be either public or private at the discretion of the school committee.

The Appeals Court had held that the specific terms of G.L. c.71, s.42 override the general provisions of the open meeting law. Kurlander v. School Committee of Williamstown, 16 Mass. App. Ct. 350, 361 (1983) However, the legislature recently amended G.L. c.71, s.42 to modify dismissal procedures for teachers. (St. 1993, c.71, s.44). Under the new procedure, dismissal is initiated first by the principal, then reviewed by the superintendent, and finally, an arbitration panel. Since neither the superintendent nor the principal is subject to the open meeting law, teacher dismissal hearings remain outside the scope of the law.

Discussion of employee grievances normally falls within the open meeting law's "collective bargaining session" exception, and thus may take place in executive session. However, where the legislature has not statutorily provided for a closed disciplinary hearing,

the open meeting law's proviso of an "express statutory right of a public employee to have his dismissal considered at a public session takes precedence over the more general [collective bargaining] exception." Bartell v. Wellesley Housing Authority, 28 Mass. App. Ct. 306, 308 (1990).

In summary, the discipline exception to the open meeting law exempts disciplinary action against public employees to protect both the individual's reputation, and the interest of the public in maintaining efficient personnel management and employee morale. Doherty v. School Committee of Boston, 386 Mass. 643, 646 (1982).

The Commonwealth of Massachusetts

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NORFOLK DISTRICT

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NOV 13 1985

November 12, 1985

Albert S. Robinson
Town Counsel
P.O. Box 375
47 Church Street
Wellesley, MA 02181

Dear Mr. Robinson:

This office has received a written Open Meeting Law complaint from a Wellesley Housing Authority employee concerning a Housing Authority meeting on August 28, 1985.

The employee was notified that he was discharged on July 30, 1985. He filed a grievance form requesting a grievance hearing before the Housing Authority to appeal this dismissal pursuant to an established Housing Authority personnel policy. Another grievance regarding a suspension of the same employee was already pending before the Authority.

The employee notified the Housing Authority that he requested that this hearing be in open session. The Housing Authority nevertheless conducted the hearing in executive session, relying on the collective bargaining exception to the Open Meeting Law, G.L. c. 39, Section 23B.

Normally an executive session may be held to consider the "discipline or dismissal of, or to hear complaints or charges brought against a public. . . employee. . . or individual." G.L. c. 39, sec. 23B, executive session purpose (2). However, the same subsection of the Municipal Open Meeting Law provides that a "governmental body shall hold an open meeting if the individual involved requests that the meeting be open." (emphasis added). In this case, the employee did request that the meeting be open. This is a specific statutory right to an open session that has been conferred upon the individual employee by G.L. c. 39, sec. 23, par. 4, clause (2).

In our telephone discussion and in your letter of November 6, 1985, you pointed out that the Housing Authority believed

that an executive session was permissible, despite the employee's open session request, because this was a collective bargaining grievance. You also cite the context of two pending unfair practice charges, employee organizing, and a past practice of closed session grievance and dismissal hearings.

Under executive session purpose (3) of G.L. c. 39, Section 23B, an executive session may be held "to conduct collective bargaining." You have also referred me to Ghiglione v. School Committee of Southbridge, 376 Mass. 70 (1978), and Board of Selectmen of Marion v. Labor Relations Commission, 7 Mass. App. Ct. 360 (1979), in support of the Authority's reliance on the collective bargaining exception.

The Ghiglione case holds that for purposes of the collective bargaining exception, "[c]ollective bargaining sessions encompass. . . the resolution of grievances pursuant to the collective bargaining agreement." 376 Mass. at 73. In the Marion case, the court upheld the Labor Relations Commission finding that the selectmen failed to bargain in good faith by insisting on conducting collective bargaining sessions in meetings open to the public, 7 Mass. App. Ct. at 361, 362.

In the present case, the employee's request for a hearing on his dismissal was a grievance hearing pursuant to past practice even though there was as yet no collective bargaining agreement in effect. See Attorney General v. School Committee of Taunton, 7 Mass. App. Ct. 226, 230-231 (1979); District Attorney for the Northwestern District v. Board of Selectmen of Sunderland, 11 Mass. App. Ct. 663, 666 (1981). Nevertheless, even if this hearing is treated as a grievance hearing and collective bargaining under the Ghiglione case, it was still unmistakably a hearing "to consider the . . . dismissal. . . of. . . a public. . .employee." G.L. c. 39, sec. 23B, 4th par., clause (2). The Housing Authority was reviewing the dismissal action that had already been taken by the executive director. Reviewing the dismissal was "consider[ing] the . . . dismissal" under clause (2) of the statute.

Neither the collective bargaining exception nor the Ghiglione case provides any authority for a governmental body to override the employee's specifically conferred statutory right to an open session, upon request, when the particular hearing in question is a dismissal hearing. G.L. c. 39, sec. 23B, 4th par., clause (2). Similarly, while the Marion case

upheld an unfair labor practice finding when the selectmen insisted upon open session collective bargaining, that case did not involve or discuss a dismissal hearing and does not in any way undermine an employee's statutory right to an open session at a dismissal hearing.

The importance of an employee's right to an open session dismissal hearing was recognized by the court in Puglisi v. School Committee of Whitman, 11 Mass. App. Ct. 142 (1981). (public hearing on discipline or dismissal of a principal; closed session with superintendent afterward violated Open Meeting Law). The specific provision in clause (2) giving the employee the right to an open session when the hearing is a dismissal hearing must be construed as a particular limitation on the otherwise general authority of the governmental body to hold an executive session for collective bargaining unde clause (3). Similarly the Housing Authority's past practice of closed session grievance and dismissal hearings cannot override the employee's statutory right to an open session dismissal hearing when he requests it. Compare Perryman v. School Committee of Boston, 17 Mass. App. Ct. 346, 352 (1983) (portion of suspension hearing may be in executive session under litigation exception where teacher threatened to seek a restraining order within a week); Kurlander v. School Committee of Williamstown, 16 Mass. App. Ct. 350, 360 (1983) (tenured teacher dismissal hearing under special provisions of G.L. c. 71, Section 42).

In our judgment, the Housing Authority, without any improper intent, erroneously relied on the collective bargaining exception to override the employee's specific statutory right to an open session at the dismissal hearing. The Housing Authority should now afford the employee a new hearing in open session on the question of his dismissal.

Thank you for providing me with the necessary information and arguments in support of the Housing Authority's position. District Attorney William D. Delahunt joins me in acknowledging that there have been exceptionally few Open Meeting Law complaints regarding Wellesley town boards.

Sincerely yours,

Charles J. Hely
Assistant District Attorney

CJH:CMW

SECTION VII: EXCEPTION 3

To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the governmental body, to conduct strategy sessions in preparation for negotiations with nonunion personnel, to conduct collective bargaining sessions or contract negotiations with nonunion personnel.

Although the statute originally referred only to "collective bargaining," a 1985 amendment to c.39, s.23B expanded this exception to include bargaining sessions or contract negotiations with non-union personnel. The amendment came in response to several cases which recognized that open and public contract negotiations with non-union personnel may be detrimental to ongoing collective bargaining with union groups.

Prior to the amendment, in Attorney General v. School Committee of Taunton, 7 Mass. App. Ct. 226 (1979), it was held that a school committee could hold an executive session under this exception to discuss salaries of various non-union employees. This was so even though the employees were not involved in a collective bargaining unit. The court stated that, "there was evidence . . . that the committee was engaged in active negotiations with . . . [three unions], and that a decision had not been made with respect to the salary proposals that would be offered to the bargaining representatives of these groups. There was ample evidence to support the conclusion that the factors involved in the setting of the salaries for the non-union personnel could, if known to the union groups, have an effect on the wage packages that would be detrimental to the ongoing collective bargaining discussions with those groups."

In District Attorney for the Northwestern District v. Board of Selectmen of Sunderland, 11 Mass. App. 663 (1981), a governmental body met with department heads to discuss the salaries of non-union employees. An executive session was held purportedly under the "collective bargaining" exception. In distinguishing this case from the Taunton case, the Appeals Court noted that at the time of the executive session, there were no collective bargaining negotiations pending and, in fact, no employees under the authority of the governmental body who were members of a collective bargaining unit or represented by collective bargaining agents. These cases emphasize that executive sessions to discuss strategy with respect to collective bargaining with union personnel can only be held if a governmental body can establish that an open meeting will have a detrimental effect on the bargaining position of the governmental body.

While the statute as amended in 1985 permitted executive sessions to discuss strategy with respect to "collective bargaining" no such exception was provided for strategy sessions involving contract negotiations with non-union personnel. The absence of a "strategy" exception for non-union contract negotiations was remedied by a 1988 amendment.

"Collective bargaining sessions" under the third exception encompass not only negotiations leading to a collective bargaining agreement, but also the resolution of grievances pursuant to a collective bargaining agreement. Ghiglione v. School Committee of Southbridge, 376 Mass. 70, 73 (1978); Bartell v. Wellesley Housing Authority, 28 Mass. App. Ct. 306, 308 (1990).

In one instance, the Appeals Court upheld a ruling by the State Labor Relations Commission that the failure of a governmental body to agree to negotiate with collective bargaining agents in executive session, over the objection of the bargaining agents, constituted a failure to negotiate in good faith. Selectmen of Marion v. Labor Relations Commission, 7 Mass. App. 360 (1979).

The collective bargaining and litigation exception recognizes that public officials might be unduly hampered in the performance of their duties if all gatherings of such bodies were required to be open to the public. Ghiglione v. School Committee of Southbridge, 376 Mass. 70, 72-73 (1978).

Regarding litigation, the exception deals with strategy meetings concerning ongoing litigation, and permits executive sessions in those circumstances where a governmental body can properly anticipate a legal challenge to its proposed action as a result of a threat of a specific lawsuit. Doherty v. School Committee of Boston, 386 Mass. 643, 648 (1982). Once again, an open meeting must be shown to have a detrimental effect on the litigating position of the governmental body.

The litigation strategy exception cannot, however, be applied broadly to all situations when a board can anticipate litigation. There are many situations in which a governmental body such as a zoning board of appeals knows that a particular adjudicatory decision will be challenged in court. Legal challenges to board decisions by developers, neighborhood groups or other interested parties are common today. Yet it is clear that zoning boards of appeals, planning boards and other local license and permit granting boards are fully subject to the open meeting law and cannot conduct their deliberations on permit granting decisions in executive session. Yaro v. Board of Appeals of Newburyport, 10 Mass. App. Ct. 587, 590-591 (1980).

The litigation exception is not synonymous with the attorney-client privilege. The Supreme Judicial Court has rejected a claim that the open meeting law does not apply to a private meeting of a governmental body with its attorney. Unless such a meeting falls within a specific statutory exception to the open meeting law, such discussions must be held in open session. District Attorney for the Plymouth District v. Board of Selectmen of Middleborough, 395 Mass. 629, 634 (1985).

April 8, 1991

Karen Kelly
Kopelman and Paige, P.C.
101 Arch Street
Boston, MA 02110-1112

RE: Open Meeting Law Complaint Against Walpole Zoning Board of Appeals

Dear Ms. Kelly:

Thank you for your response on behalf of the Walpole Zoning Board of Appeals (Board) regarding its alleged violation of G.L. c. 39, ss. 23A-23C (Open Meeting Law) on June 1, 1989 when it went into executive session pursuant to subsection c of that statute (litigation exception) for settlement discussions relative to the litigation between Union Street Realty Trust and the Board. It is my purpose in this letter to render a decision with respect to that allegation. In so doing, I will respond to several of the points raised in your letter.

First, I conclude that when a local governmental entity goes into executive session pursuant to a proper invocation of the litigation exception to the Open Meeting Law it is not obliged to permit intervenors in the litigation at issue to be present. The purpose of that type of executive session, as you correctly point out, is essentially to facilitate a candid and confidential exchange between the governmental entity and its attorney, town counsel. While an intervenor may be vested with certain rights vis-a-vis the litigation to which he has become a party, he is not thereby placed in an attorney-client relationship with town counsel. Accordingly, he is not entitled to intrude upon otherwise legitimate confidential strategy discussions between the local governmental entity and town counsel about the litigation.

Second, I must disagree your suggestion that the complainants in the present case are without standing to challenge the propriety of the executive session in controversy

because they were not present at the Board meeting during which it took place. In my view, their presence or absence is irrelevant. They have raised a credible claim that the Board violated the Open Meeting Law and as citizens of the Town of Walpole and Norfolk County they are entitled to an adjudication of that claim by the District Attorney. Parenthetically, I note that the statute itself does not impose the kind of standing requirement of which you speak, as it authorizes-- without caveat-- three or more registered voters to seek a remedial court order for perceived violations of the Open Meeting Law. See G.l. c. 39, s. 20B.

Finally, I come to the crux of the complaint before me: whether the Board properly invoked the litigation exception to go into executive session at its meeting on June 1, 1989. All parties agree, and the printed minutes that the complainants have provided to me confirm, that the purpose of the executive session was to discuss the ongoing litigation between the Board and Union Street Realty Trust involving the proposed construction of a Stop and Shop Supermarket in the town. The precise question before me is whether the presence at the executive session of counsel for Union Street Realty and Stop and Shop, the plaintiffs in the suit, rendered the litigation exception inapplicable. I conclude that it did.

By its terms, that exception permits a governmental entity and its attorney to plot litigation strategy outside the public forum if to do otherwise would have a "detrimental effect" on its litigating position. G.L. c. 39, s. 23(3). Because a legal adversary can attend an open meeting, it would obviously compromise a governmental entity's litigation posture to be required to strategize in public. See Note, The Massachusetts Open Meeting Law, An Historical Overview and Contemporary Analysis, 25 New Eng. L. Rev. 257, 272-273 (1980) ("It is hard to envision a serious discussion of litigation in the presence of an opponent that could not have a detrimental effect on that litigation."). In recognition thereof, the exception was created.[1]

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[1]Your letter of of May 11, 1990 to Town Administrator James Merriam reveals that your understanding of the litigation exception, at least at that time, was consonant with my own interpretation. There you stated that Robert Foster, the intervenor in the Union Street Realty Trust suit, was excluded from executive session discussions between yourself and the Board regarding the suit because his presence might defeat the applicability of the litigation exception, thus "requiring [the Board] to conduct its strategy in open meetings in the presence of the Plaintiff."

Inasmuch as it was not the Board's purpose in this instance to plan litigation strategy, but rather, to engage in substantive settlement discussions with adversary counsel, there was no legitimate justification for invoking the litigation exception here. Under the circumstances it is difficult to perceive how it would have been detrimental to the Board's position to have conducted the discussions in open session. Accordingly, I find that, although undoubtedly well intentioned, the Board violated the Open Meeting Law when it went into executive session on June 1, 1989.[2]

Because the Board has already released minutes from the executive session (and the litigation has been concluded in a manner favorable to the Town), no specific remedial action is necessary. I ask, however, that you apprise the Board, and all other such governmental entities in the Town of Walpole whom you advise, of the substance of this letter so that violations of a similar nature can be avoided in the future.

Very truly yours,

James Lang
Assistant District Attorney

JFL
cc: William Carmody

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[2]I have read and considered the case you appended to your response to the complaint, Hills Development Co. v. Township of Bernards, 551 A.2d 547 (N.J. Super. 1988). I did not find it to be persuasive as the litigation exception to the New Jersey Open Meeting Law that the court construed therein is somewhat broader than its Massachusetts counterpart.

SECTION VIII : EXCEPTIONS 4, 5, 6, 7

To discuss the deployment of security personnel or devices.

The discussion of such issues in public would be self-defeating. The legislature has provided an exception to permit confidential communications so that public officials will not be "unduly hampered" by the general requirement that business be conducted in the open. As a general rule, deployment of "security personnel" will not include routine assignment of police officers.

To investigate charges of criminal misconduct or to discuss the filing of criminal complaints.

The law recognizes that it may be inconsistent with effective law enforcement to conduct criminal investigations in the public eye. Indeed, public access to information related to criminal misconduct should be restricted in certain circumstances. Bougas v. Chief of Police of Lexington, 371 Mass. 59, 62 (1976). It should be noted, however, that general complaints or charges against individuals are governed by the second exception to the open meeting law, and executive sessions are limited by the procedural protections afforded the individual under that exception. Governmental bodies must proceed with caution to distinguish between instances which properly fall within exception two, rather than exception five. For example, a school committee may meet to discuss the discipline of a student who has assaulted another student. If the committee is meeting to discuss exclusion of the student without intending to explore a criminal option, it would be inappropriate to meet under exception (5).

To consider the purchase, exchange, lease or value of real property, if such discussions may have a detrimental effect on the negotiating position of the governmental body and a person, firm or corporation.

This exception recognizes that public discussion of the negotiations described would invite speculation and drive up the eventual price paid by the government. While there is no prospect that public discussion may have a detrimental effect, the exception may not be involved. While it has been suggested that other large contract negotiations should also be exempt from the requirement of the open meeting law, the Supreme Judicial Court has indicated that all exceptions to the open meeting law are limited by the choice of language contained in the statute and that, "the legislative mandate cannot be misunderstood." District Attorney for the Plymouth District v. Board of Selectmen of Middleborough, 395 Mass. 629, 633 (1985).

To comply with the provisions of any general or special law or federal grant-in-aid requirements.

There may be provisions in certain statutes or the conditions of certain federal grants which require the discussion of particular issues in executive session. With respect to federal grants-in-aid, it is the intention of this exception to prevent the open meeting law from operating as a disqualification for such grants to cities and towns of this Commonwealth if confidentiality may be required.

SECTION IX : EXCEPTION 8

To consider and interview applicants for employment by a preliminary screening committee or subcommittee of governmental body if an open meeting will have a detrimental effect in obtaining qualified applicants, provided that this clause shall not apply to any meeting, including meetings of a preliminary screening committee or subcommittee, to consider and interview applicants who have passed a prior preliminary screening.

This exception, added in 1987, recognizes a job applicant's rights to privacy in preliminary discussions, as well as a governmental body's need for confidentiality in such discussions in order to encourage all applicants.

By its express terms, it is limited only to a preliminary screening committee or subcommittee of a governmental body. Note that the exception may not be invoked unless an open meeting will have a detrimental effect in obtaining qualified applicants. It behooves a government body, therefore to establish a basis in the record for believing that such a "detrimental effect" would in fact occur. If even one candidate indicates that he would withdraw if his identity were made public during the initial screening process, that is a sufficient basis to justify executive session. Gerstein v. Superintendent Search Screening Committee, 405 Mass. 465, 470 (1989). Gerstein also clarifies that the "preliminary screening" is not "limited to a one-time only review of an applicant's credentials." 405 Mass. at 471.

Nothing in the law appears to prohibit a government body from appointing itself as a screening committee* Regardless, however, of who does the screening, finalists must be interviewed in open session. Note, also, that the screening committee is subject throughout the process to the open meeting law. It must post notices of its meetings. Only the preliminary screening and interviewing may take place in executive session. Other matters--for example, a discussion as to whether to survey the community or hire a consultant, must take place in open session.

Certain kinds of advisory committees fall outside the open meeting law. Such committees are those established by an official legally authorized to make a selection or required to make a recommendation to the hiring body. The Supreme Judicial Court has held that a superintendent of schools, required by G.L. c.71, s.38 to make a recommendation to the School Committee for the position of principal, could appoint an advisory screening committee which, like the superintendent himself, was not subject to the open meeting law. Connelly v. School Committee of Hanover, 409 Mass. 232, 238 (1991).

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*It is fair to point out that the Attorney General's Office has apparently reached the opposite conclusion. It claims that the exemption "does not apply . . . to a screening by a governmental body itself . . . [but] only to a special committee or subcommittee." Harshbarger, Open Meeting Law Guidelines, p. 24.

The limited scope of this decision is apparent from the court's pointed observation that "if the selection committee were otherwise subject to the open meeting law, having it nominally appointed by the superintendent would be to no avail." 409 Mass. at 236, n.8. Of course, nothing prohibits a committee outside the scope of the open meeting law from voluntary compliance with its strictures.

SECTION X : ENFORCEMENT

The District Attorney of the county in which the violation occurred shall enforce the provisions of this section.

The primary enforcement role in the open meeting law is assigned to the District Attorney. The Attorney General and groups of three or more registered voters are also empowered to file complaints in the Supreme Judicial Court and the Superior Court, seeking relief from violations of the open meeting law.

When an individual complains to the District Attorney that the open meeting law has been violated he is asked to reduce the complaint to writing. The complaint is then scrutinized by an Assistant District Attorney who regularly deals with the open meeting law. Unless it is possible to determine from the face of the complaint that no violation took place (a fairly unusual occurrence), the Assistant District Attorney will write the government body in question, providing a copy of the complaint and requesting the board's response.

The burden of proving by a preponderance of the evidence that a violation did not take place lies with the government body. G.L. c. 39, s. 23B. It is particularly important, therefore, that the board's response be complete and fully documented.

After hearing from both sides, the District Attorney's Office issues a ruling. If a violation is found, the ruling will request a specific remedy. If the board agrees to implement the remedy, the case is settled. If it does not, the District Attorney will initiate a court suit against the board. The open meeting law has recently been amended to allow the imposition of $1000 fine against the offending body. (Ch. 455 of the Acts and Resolves of 1994).

It has so far been the experience of the District Attorney that town boards are cooperative in voluntarily complying with this office's rulings. As a result, full enforcement of the law has been possible at minimal cost to taxpayers.

The District Attorney's Office stands ready to assist town officials in interpreting the open meeting law. Generally, towns are advised to work in the first instance through town counsel. Town counsel not only have a working familiarity with the local issues, but may be aware of statutes and regulations apart from the open meeting law which may, in some instances, mandate the use of executive session.

Upon proof of failure by any governmental body or by any member or officer thereof to carry out any of the provisions for public notice of meetings, for holding Open Meetings, or for maintaining public records thereof, any justice of the Supreme Judicial Court or the Superior Court sitting within and for the county in which such governmental body acts shall

issue an appropriate order requiring such governmental body or member or officer thereof to carry out such provisions at future meetings.

Such order may invalidate any action taken at any meeting at which any provision of this section has been violated, provided that such complaint is filed within twenty-one days of the date when such action is made public.

One seeking a court order undoing a board's action must file within 21 days of the action's becoming public. The 21 day filing deadline applies only to invalidation. A judge has a wide range of other remedies which he may, in his discretion, employ, including injunctive relief and fines against the government body. All remedies rest within the judge's discretion.

A court will not extend the remedy of invalidation beyond the meeting at which the violation occurred. Thus, where an individual was improperly dismissed, then correctly dismissed at a later meeting, the court declined to order him reinstated, but instead awarded back pay from the date of the invalid meeting to the date of the valid one. Puglisi v. School Committee of Whitman, 11 Mass. App. Ct. 142, 146-147 (1981). The same remedy, on similar facts, was afforded in Bartell v. Wellesley Housing Authority, 28 Mass. App. Ct. 306 (1990). These cases point to the wisdom of a government body's prompt action in correcting errors under the open meeting law.

One remedy which is generally unavailable, absent legislative action, is an award of attorney's fees to the prevailing party. However, if the claims made by a government body are "wholly insubstantial, frivolous and not advanced in good faith," attorneys' fees may be awarded under G.L. c. 231, s. 6F. Pearson v. Board of Health of Chicopee, 402 Mass. 797, 801 (1988).